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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM H. DECK, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners Manning A. Kless, Jean G. Kless, and William H. Deck respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 25, 1964.

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the District of Columbia is not officially reported and is printed in Appendix A hereto, p. 1a. The opinion of the Court of Appeals dated June 25, 1964, is reprinted in Appendix B hereto, p. 7a, and is reported at F (2d) , 14 AFTR 2d 5028.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked by virtue of the following:

(i) The judgment of the Court of Appeals sought to be reviewed was dated and entered June 25, 1964. Rehearing was denied by an order dated September 25, 1964.

(ii) This Court has jurisdiction of this cause pursuant to the authority of Title 28, U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a taxpayer, all of whose principal records have been destroyed and against whom a criminal prosecution is threatened, can claim the privilege of the Fifth Amendment to resist production by him or his attorney of certain papers which state law provides are the property of his accountant, but which have legitimately come into the taxpayer's possession.

2. Whether this Court, or any federal court, has definitively set down what degree of proprietary or possessory interest in potentially incriminating documents is required to support a claim of privilege under the Fifth Amendment.

3. Whether the restrictions of property law should be abandoned in assessing a claim of privilege under the Fifth Amendment just as this Court has deemed proper for purposes of applying the counterpart safeguard of the Fourth Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment and pertinent parts of the Fifth Amendment to the Constitution of the United States are set forth in Appendix C, p. 11a, *infra*.

The pertinent sections of the United States Code, being Title 28, Sec. 1254(1) and Title 26, Sec. 7604, are set forth in Appendix C. p. 11a, *infra.*

The pertinent section of the California Business and Professions Code, being Section 5037, 3A West's Annotated Cal. Code, is set forth in Appendix C, p. 12a, *infra.*

Treasury Department Circular No. 230 (Rev.) Subpart A, Sec. 10.3 (a) (d) is set forth in Appendix C, p. 13a, *infra.*

STATEMENT OF THE CASE

This is a suit under Section 7604 of the Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7604) for the enforcement of an administrative summons issued to petitioner Deck, an attorney-at-law admitted to practice in the District of Columbia and a member of the bar of this Court, calling, *inter alia*, for the production of the work papers of one Phillips, a California accountant,[1] relating to the affairs of Deck's clients, petitioners Manning A. and Jean G. Kless.

On March 21, 1963, petitioner Deck was visited in his office by Mr. William J. Kiger, an agent of the Internal Revenue Service, who served upon him a summons to appear in Mr. Kiger's office on April 4, 1963, and to bring with him certain books and papers concerning the financial affairs of the J. B. Kless Company, of which company petitioner Manning A. Kless is the active partner (JA 39). Petitioner Deck indicated to Mr. Kiger at that time that he could not comply with the summons on the grounds that so to do would violate both his client's privilege under Amendment V of the Constitution and

[1] Petitioners have maintained throughout the proceedings below that Phillips served the J. B. Kless Company in the capacity of a bookkeeper. The courts below have found otherwise, so that for the purposes of this petition, petitioners concede this point.

the privilege relating to communications between an attorney and his client (JA 41-42). Mr. Deck did not and has not complied with the summons (JA 40). However, he answered the summons forthwith and gave his reasons for non-compliance (JA 41).

On November 21, 1963, almost seven months later, the Government filed a petition to enforce the summons (JA 1) pursuant to the authority of Sec. 7604 (a) (b) I.R.C. On the same date, there was issued an order to William H. Deck to show cause why the summons should not be enforced against him (JA 1).

On January 23 and 24, 1964, hearings were held before Judge Sirica, in which proceedings Manning A. Kless and Jean G. Kless intervened to assert their rights under Amendment V of the Constitution which they believe to be in jeopardy (JA 11-12). The petition to intervene was granted, and William H. Deck was named as co-counsel for intervenors (JA 11-12). On January 24, 1964, Judge Sirica issued an order requiring compliance with the summons, from which order an unsuccessful appeal was taken to the United States Court of Appeals for the District of Columbia Circuit.

The relevant facts concerning the papers under the summons are as follows. Sometime in the latter part of 1945 or early 1946, petitioner Kless began to make use of the services of one Lloyd B. Phillips in his business (JA 52). Mr. Phillips was then, and at all times since has been, a public accountant licensed in the State of California. The services rendered by Mr. Phillips included posting ledgers, writing checks, and performing internal audits (JA 67 et seq.). Throughout the entire period of his employment (1946-1963), the services performed by him were those asked of him and, in fact, directed to be performed by Mr. Kless (JA 53). In the course of providing his bookkeeping services, Mr. Phillips prepared and made use of certain papers which, for convenience,

may be referred to as "work papers" (JA 57-58). These papers were prepared by Phillips on the basis of information either supplied to him by petitioner Kless directly or taken from the basic records of the Kless Company, (Tr 30-34 etc.) and were prepared on the premises of the Kless Company though filed in Phillips's own office.

In 1962, the basic records of the J. B. Kless Company were destroyed, as a result of a serious fire, with the result that the "work papers" became the only extant records of the Company (JA 127-128). Phillips, himself a witness antagonistic to petitioners, conceded that the records in question were necessary for the preparation of income tax returns for Mr. and Mrs. Kless, and the J. B. Kless Company (JA 75-76), and were, in fact, a necessary part of the bookkeeping system of the Company.

On November 27, 1962, Phillips voluntarily turned over the papers in question, which had been in his possession, to petitioner Kless, so that Kless could confer with petitioner Deck concerning threatened criminal proceedings against him. In late June of 1963, Phillips was invited to a meeting at Kless's home where he was informed by Deck that the work papers were not his property but rather belonged to Kless (JA 65-66). At Kless's request, the papers in question were returned to him by Deck on July 1, 1963. Deck and/or Kless retained possession of the work papers until January 24, 1964, when the District Court ordered them to be placed in the registry of the Court pending disposition of the case on appeal. The Court of Appeals has granted petitioners a 30-day stay of the mandate pending filing of this petition.

REASONS FOR GRANTING THE WRIT

The decision below that Kless should not be permitted to raise the protection of the Fifth Amendment in respect of the papers involved herein and the reasons given for

that decision are in conflict with decisions of this Court concerning the manner and spirit in which the availability of the Fifth Amendment's protection is to be tested as well as conflicting with the approach which this Court has taken in assessing claims under the Fifth Amendment's companion safeguard, the Fourth Amendment. The decision below conflicts both in result and reasoning with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Judson*, 322 F.2d 460 (1963). This case involves an important question concerning the application of constitutional amendments which has not been, but should be, decided by this Court.

ARGUMENT

I. The Decision Below Is In a Way In Conflict With Applicable Decisions of this Court

A. *The decision below conflicts with decisions of this Court concerning the application of the Fifth Amendment.*

It is clear from the opinion of the court below that its denial of petitioners' claim of privilege under the Fifth Amendment was based upon the following reasoning:

a) the District Court has made a finding that Phillips was an accountant;

b) California law makes an accountant the owner of his working papers;

c) thus, the requested return by Phillips of the papers was sufficient to extinguish forthwith whatever interest Kless may have had in them and simultaneously to preclude his plea of self-incrimination by the enforced production of the papers out of his possession.[2]

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[2] It should be noted that Phillips himself is not an active party to the proceedings herein; petitioners have contended, and do contend, that the property rights of the parties in these papers should more properly be settled in a California court rather than at the suit of the United States.

Though it is not entirely clear what degree of proprietary interest in potentially incriminating material is required to support a Fifth Amendment claim, it is submitted that the above-outlined approach puts an inordinate stress on the effects of state laws and their capacity to defeat a claim of privilege under the Federal Constitution making, as it does, ownership the conclusive factor. It is submitted further that such a narrow mechanistic approach is contrary to the attitude which this Court has demonstrated in the application of the Fifth Amendment.

Addressing himself to the problem of standing to claim self-incrimination in respect of papers and records, Mr. Justice Murphy said in *United States* v. *White* (1944) 322 US 694, 64 S.Ct. 1248, 88 L.Ed. 542:

> "Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.*" [3] (emphasis supplied)

From this, it would appear that it is not only the owner of the records who is in a position to raise a self-incrimination plea in respect of them so long as the claimant's possession is "purely personal". The J. B. Kless Company is a partnership consisting of petitioners Mr. and Mrs. Kless so that no possibility exists that Mr. Kless's possession was other than personal. Yet the court below, concerning itself only with ownership, made no attempt to analyze the incidents or circumstances of petitioners' possession of the papers. This Court has said:

> "The physical custody of incriminating documents does not of itself protect the custodian against their compulsory production *but the question still remains with respect to their nature and the capacity in which they are held.*" *Wilson* v. *United States*, 221 U.S. 361, 380, 31 S. Ct. 538 55 L. Ed. 771. (emphasis supplied)

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[3] 322 U.S. 694, 699.

It is submitted that the court below departed from the stricture of the above passage when, satisfied that Kless was not the owner of them, it determined that a mere demand for the return of the papers was sufficient to extinguish Kless's rights therein.

Had the court below turned itself to the question of the *nature* of the papers it would have found: they related entirely to petitioners' business affairs; they were based upon information either supplied directly by petitioner Kless or derived from the private records of his company; the work involving the papers was actually performed on petitioners' premises; the confidential information on which the papers were based grew out of a relationship which, though perhaps not privileged, is considerably more than casual. As to the *capacity* in which the papers were held by Kless, the court below ignored the fact that these papers were in no way obtained by stealth or subterfuge. Kless obtained them with Phillips' approval for a reasonable purpose, to reveal to his attorney the only extant records of his tax affairs. This purpose was bound to and did, in fact, continue for some time and it is submitted that Kless's retention of them was consistent with the terms of his request and possession.

Petitioners believe that in circumstances such as these the rights which Kless had in the papers in question were sufficiently defined as to make a mere demand for their return insufficient to extinguish them. The court below's complete reliance upon the concept of ownership fails to take into account the quoted statements of this court that other factors than ownership must be considered in determining the availability of the Fifth Amendment's protection.

Petitioners belief further that this stress upon the confines of property law in assessing such a claim of privilege is at variance with this Court's pronouncements

upon the spirit in which constitutional safeguards are to be interpreted. In asserting with full vigor the manner in which the Fifth Amendment is to be applied and maintained this Court has said:

> "It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command of the Fifth Amendment ('nor shall any person . . . be compelled in any criminal case to be a witness against himself . . .') registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. The Founders of the Nation were not naive or disregardful of the interests of justice. The difference between them and those who deem the privilege an obstruction to due inquiry has been appropriately indicated by Chief Judge Magruder:
>
> > 'Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution. had in mind a lot of history which has been largely forgotten today. See VIII Wigmore on Evidence (3d ed 1940) § 2250 et seq.; Morgan, The Privilege Against Self-Incrimination, 34 Minn L Rev 1 (1949). They made a judgment, and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in

> part, with the assistance of enforced disclosures by the accused. The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and we have been admonished that it should be given a liberal application. Hoffman v. United States, . . . 341 US 479, 486 . . . If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out 'of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion.' *Maffie* v. *United States* (CA1st Mass) 209 F2d 225, 227." *Ullmann* v. *United States*, 350 U. S. 422, 426-428, 76 S. Ct. 497, 100 L. Ed. 511.

What could be more hostile or niggardly than to conclude that petitioners' constitutional rights have been circumscribed by the effects of the California Business and Professions Code?

B. *The decision below conflicts with decisions of this Court concerning the application of the Fourth Amendment.*[4]

In dealing with the problem of the requisite proprietary interest for the purposes of the Fifth Amendment, petitioners believe that it is not improper to discuss the approach which this Court has used in connection with that problem for the purposes of the Fourth Amendment, for this Court has repeatedly stressed the interaction and intimacy between the two amendments.[5]

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[4] Petitioners do not and have not claimed that there was an unlawful search and seizure involved here but raise the Fourth Amendment for reasons amplified *infra*.

[5] "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a

The question of whether an individual other than the owner of property entered or seized could complain of an unlawful search and seizure was authoritatively laid to rest by this Court in *Jones* v. *United States*, (1960) 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed. 2d 697, in which the restraints of common law property designations such as licensee, invitee, and guest were rejected as inadequate to delimit the effects of constitutional safeguards. It was held sufficient for the invocation of the Fourth Amendment that the complainant be lawfully on the premises under search and that "its fruits are proposed to be used against him."[6] Petitioners believe that in view of the inter-relation between the Fourth and Fifth Amendments and the similarity of the evils which they are designed to forestall it was inconsistent with the standards laid down by this Court in *Jones* for the Court below to deny petitioners' constitutional claim on the technicalities of the ownership of the papers here in question.

Petitioners believe further support for their position can be found in *United States* v. *Jeffers*, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59, for there it had been provided by law that no property right could have existed in the goods seized. Moreover, the premises searched in *Jeffers* had been rented by third persons, who, petitioners submit, might well have sought to terminate *Jeffers'* occupancy

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criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." *Boyd* v. *United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. See also *Gouled* v. *United States*, 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647; concurring opinion of Mc Kenna, J. in *Hale* v. *Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652; *Davis* v. *United States*, 328 U.S. 582, 66 S. Ct. 1256, 90 L. Ed. 1453.

[6] 362 U.S. 267.

had they known that narcotics were being secreted there, just as Phillips sought to terminate Kless's possession of the papers here in question. Nonetheless this Court, stripping the situation down to its actualities, affirmed Jeffers' standing to assert the Fourth Amendment's protection. Petitioners submit that the Court of Appeals here departed from the standards set by this Court in its complete reliance on the subtleties of property law to assess Kless's constitutional claim, for there is no reason which petitioners can discover why the two interdependent constitutional safeguards of the Fourth and Fifth Amendments should be subjected to such contradictory appraisals.

II. The Decision Below Conflicts With the Decision of Another Court of Appeals on the Same Matter and There is in Addition Considerable Inconsistency and Confusion Among Lower Federal Courts in This Area of the Law

A. *The decision below is in conflict with the decision of another court of appeals on the same matter.*

Petitioners believe that the decision below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Judson*, 322 F. 2d 460, decided July 30, 1963. In that case, the taxpayer at the request of counsel had directed two accountants to prepare certain work papers and a net worth statement. The papers were then placed in the hands of taxpayer's counsel upon whom was served a subpoena duces tecum, requiring him to produce before the Grand Jury certain papers, including, *inter alia*, the work papers and net worth statement prepared by the accountants. Upon his non-compliance, the District Court refused enforcement on the ground:

> "* * * that it would be a violation, not only of the attorney-client privilege in that these are part of the attorney's work papers, but also on the further

ground that it would be a violation of the Fifth Amendment * * *" [7]

The Ninth Circuit affirmed the District Court's conclusions that both the attorney-client privilege and the Fifth Amendment would preclude such enforcement.

Though, as in the instant case, most of the operative facts in *Judson* occurred in California, petitioners find no reference in the case to the question of the ownership of the work papers nor to the effects on that question of Section 5037 of the California Business and Professions Code. On the contrary, the Ninth Circuit relied entirely upon the nature of the relationship between a taxpayer, his accountant, and counsel in determining that the taxpayers would have had, and consequently, their counsel did have standing to raise a plea of self-incrimination on their behalf. In distinguishing cases relied upon by the Government, the Court set aside one group of cases where the incriminating matter was not "owned or possessed" [8] by the taxpayer. It would appear that if the Ninth Circuit had considered ownership for purposes of the California Code, or the terminability by virtue thereof of taxpayer's possession of the papers significant, the opportunity existed for the court to so indicate. Though the primary stress in *Judson* is upon the attorney-client privilege, petitioners believe that the decision below conflicts both in result and reasoning with that case.

B. *Though the result below is consistent with that reached in other lower federal courts in regard to similar or related problems no consistent rationale emerges from these decisions taken together to guide the litigant in this area.*

(1) *In the Courts of Appeals*

In cases decided in other circuits concerning similar or related problems, petitioners believe there always occurs

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[7] 322 F.2d, 462.

[8] 322 F.2d 463.

some distinguishing or confusing feature which renders the underlying principle of these cases obscure.

Falsone v. *United States*, 205 F.2d 734 (1953), was decided by the Fifth Circuit Court of Appeals on the basis that the records under the summons were required by law to be kept and that under the principle enunciated by this Court in *Shapiro* v. *United States*, 335 U.S. 1,32,68 S. Ct. 1375, 92 L. Ed. 1787, the privileges of the Fifth and Fourth Amendments were unavailable. As to the further contention of the accountant/respondent *Falsone* that a privilege existed between him and his client, making the papers privileged, the Court denied the existence of such a privilege.

In *Sale* v. *United States*, 228 F.2d 682 (1956), the Eighth Circuit affirmed enforcement of a subpoena duces tecum issued by the Collector of Internal Revenue on the basis that no privilege having existed between the taxpayer and his accountant, who in turn handed over certain papers to taxpayer's counsel, no privilege could be invoked by counsel to justify non-compliance with the summons. The case makes no reference to constitutional amendments and it does not appear that a criminal prosecution was in any way threatened.

In *Bouschor* v. *United States*, 316 F.2d 451 (1963), also decided by the Eighth Circuit, the Court did deal with the question of the invocation of the Fourth and Fifth Amendments. No reference was made, however, to the property rights of the respective parties in the papers sought to be produced. Rather the decision appears to turn entirely on the fact that the taxpayer himself whose constitutional liberties were alleged to be in jeopardy did not personally appear to assert them. The taxpayer had neither appeared nor intervened, and the Court denied the constitutional claims, concluding that the personal nature of such claims of privilege precludes such vicarious claims by third parties.

The proprietary argument used by the Court below has been employed in only one other case which petitioners have been able to find. As indicated above, the few other existing Circuit Court decisions rest upon a number of differing and inconclusive rationales, all of which appear to conflict with *United States* v. *Judson, supra.*

(2) *There is direct conflict as well as confusion between the decision below and unreversed District Court decisions as well as among such lower Court decisions.*

Perhaps concerned with the inconclusiveness of Circuit Court decisions in this area, the court below relied entirely on decisions of this Court and of Federal District Courts,[9] but petitioners submit that less consistency exists at the lower level than at the circuit level.

Application of House, 144 F.Supp. 95 (N.D.Cal.1956), relied on heavily in *Judson*, would appear to be in direct conflict both in result and theory with the decisions below, yet that case also arose in California and required consideration of the effects, if any, of the Business and Professions Code.

The Court in *House* asserted the taxpayer's right to raise the Fifth Amendment so that the decisions below appear to be in direct conflict with the applicable law on this point in petitioner Kless's home state where virtually all of the significant facts herein took place.

Any attempt to distinguish *House* on the basis that the accountant therein had expressly waived his right to the return of the papers does nothing to clear the confusion,

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[9] *Ex Parte Fuller*, 262 U.S. 91 (1923); *Wilson* v. *United States*, 221 U.S. 361, 380 (1911); *United States* v. *Boccuto*, 175 F.Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); *Application of House*, 144 F.Supp. 95 (N.D. Cal. 1956); *Application of Daniels*, 140 F.Supp. 322 (S.D.N.Y. 1956).

for in *United States* v. *Boccuto*, 175 F.Supp. 886 (D.C.N.J. 1959), *appeal dismissed*, 274 F.2d 860 (3rd Cir. 1959), relied on by the Court below and the Eighth Circuit in *Bouschor*, the court made an express finding that even an affidavit filed by the accountant to the effect that he relinquished his rights in the papers in favor of taxpayers and their counsel did not confer a sufficient property right to support the Fifth Amendment.

Another unappealed District Court decision which conflicts with the decision below both in result and rationale applied is *Application of Donald Daniels*, 140 F.Supp. 322 (1956). The District Court for the Southern District of New York held that the ownership of potentially incriminating documents was irrelevant so long as there is "legitimate and personal possession." [10] In reaching this result, the court relied principally on the decision of this Court in *United States* v. *White, supra.*

C. *The decision below conflicts with decisions of Courts of Appeals on the matter of the proprietary or possessory interest requisite for the invocation of the Fourth Amendment.*

Continuing to analogize the Fourth and Fifth Amendments, as in Part I of this argument, petitioners consider it relevant to indicate that the decision below conflicts with decisions of other Circuit Courts concerning the application of the Fourth Amendment.

In *Steeber* v. *United States*, 198 F.2d 615 (1952), the Tenth Circuit affirmed the right of a criminal defendant to assert the Fourth Amendment in respect of certain premises which he had sublet and no longer occupied notwithstanding the fact that the sublessee undoubtedly had greater possessory rights than he at that time.

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[10] 140 F.Supp. 327.

The Second Circuit permitted the defendants in *United States* v. *Chieppa*, 241 F.2d 635 (1957) to complain of an unlawful search and seizure of goods in a car which neither of them owned and in which they expressly disclaimed any interest. They also disclaimed any proprietary or possessory interest in the contents seized. Nonetheless the protection of the Fourth Amendment was allowed to them. This approach is totally at variance with that of the court below in the instant case. Again in *United States* v. *Guterma*, 272 F.2d 344, the Second Circuit allowed a Fourth Amendment claim in respect of *corporate* documents when it appeared that the physical act of opening the safe and producing the papers would have to be performed by an individual who claimed the papers would incriminate him notwithstanding the fact that the summons itself was actually issued to the corporation in whose offices the safe was located. Referring to this point the court said:

> "Contrast this argument with the reality of the situation. Guterma is under indictment. The government admits it is making further investigations looking towards other possible offenses. Obviously, it does not seek these records to write an academic treatise on possible stock market frauds; it wants further proof to support its indictment against Guterma and to make further charges if justified. The subpoena itself seeks the records not of Jacobs relating to Guterma or Chatham Corp. but 'of Alexander L. Guterma.' Under these circumstances, to call Guterma a 'stranger' carries technical legalism beyond its outside limits."

In *Williams* v. *United States*, 237 F.2d 789 (1956), the court below itself permitted a defendant to assert the Fourth Amendment in respect of narcotics which had dropped from his pocket in a police station notwithstanding the fact that he vigorously denied any proprietary or possessory rights in them. Presumably then, if the facts

in the instant case had been such as to make the Fourth Amendment available to petitioner, the court below would have recognized his standing to make such a claim. Petitioners believe that such an anomalous situation justifies the intervention of this Court.

III. The Decision Below Concerns an Important Federal Question Which Has Not Yet Been, But Should Be, Decided by This Court

Petitioners submit that the foregoing indicates a lack of uniformity or certainty on the question of the proprietary or possessory rights essential to the assertion of the Fifth Amendment in respect of potentially incriminating documents. Petitioners submit further that in the context in which these cases arise such uncertainty raises the possibility of difficult complications in the lives of millions of citizens.

With the increasing complexity of revenue laws, and the vigor with which they are enforced, particularly in view of the care required of each taxpayer under the Automatic Data Processing of all tax returns, more and more taxpayers seek the aid of trained tax specialists, some of whom are lawyers, but the majority of whom are accountants. As to the relation between these taxpayers and their legal advisers, the law of attorney-client privilege gives a certain measure of protection. But as to accountants the situation is totally unclear. Although Treasury Regulations[11] provide for equal status before the Internal Revenue Service for attorneys and accountants alike, no privilege is said to exist between the accountant and his client.

Thus, the taxpayer who uses the services of an accountant is in a precarious position. On the one hand, if

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[11] Treasury Department Circular No. 230 (Rev.) Subpart A. Sec. 10.3 (a)(d).

he foregoes the accountant's help he may prepare his tax returns improperly. On the other hand, if he exposes his private affairs to his accountant, there may be no way in which he can keep such information out of the hands of the taxing authorities, even though such information may form the basis of a criminal prosecution against him.

The dilemma is intensified by the uncertainty introduced by state laws governing accounting for, petitioners submit, it is no more realistic to provide that certain papers belong to the accountant than it would be to vest them in his client. Petitioners would stress, however, that they do not contend herein that the relationship between the taxpayer and his accountant is a federal question to be settled by this Court. But petitioners submit that to the extent that such a relationship raises uncertainties or ambiguities in the operation of the constitutional amendment forbidding self-incrimination this Court should intervene. In this regard, petitioners would reiterate their impression that there is an undesirable disparity in approach to the Fifth, as compared with the Fourth Amendment.

CONCLUSION

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM H. DECK
538 Pennsylvania Building
Washington, D. C. 20004

Petitioner and
Counsel for Petitioners
MANNING A. and JEAN G. KLESS
D/B/A J. B. KLESS COMPANY

APPENDIX A

Docket 11953
Filed 1/29/64

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 40-63

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM H. DECK, RESPONDENT

and

MANNING A. KLESS and JEAN G. KLESS, Individually and as members of a partnership doing business as the J.B. KLESS COMPANY, INTERVENOR-RESPONDENTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing in open court, testimony and argument having been heard on the 23rd and 24th day of January, 1964, pursuant to an Application for Enforcement of an Internal Revenue Summons filed by petitioners and an Order to Show Cause entered by the Court the 21st day of November, 1963 directing Respondent to show cause why that summons should not be complied with, and the Intervenor's petition to intervene having been granted on January 23, 1964, the following findings of fact and conclusions of law are hereby entered:

Findings of Fact

1. Lloyd B. Phillips is a Public Accountant, as defined in the California Business and Professions Code, Section 5034 and he was so acting during the fiscal years February 28, 1955 through February 28, 1961.

2. Lloyd B. Phillips was engaged in the practice of public accountancy within the meaning and intent of Section 5051 of the California Business and Professions Code and he was so engaged and did render such public accountancy services to Manning A. and Jean G. Kless, doing business as, the J.B. Kless Co. for the periods relating to the Fiscal years February 28, 1955 through February 28, 1961. In the course of such engagement and in rendering such services he did prepare and originate the workpapers which were demanded in the Internal Revenue Service Summons of March 21, 1963 and served upon the Respondent, William H. Deck, by Petitioner, Internal Revenue Special Agent, William J. Kiger.

3. All statements, records, schedules, working papers and memoranda requested to be produced by the Internal Revenue Service Summons served on the Respondent on March 21, 1963 have been examined in camera and the Court finds as a fact that they were prepared by Lloyd B. Phillips incident to, and in the course of his engagement as a public accountant for and by Manning A. and Jean G. Kless, d.b.a. the J.B. Kless Co. and the Court further finds that Lloyd B. Phillips is the owner of such workpapers.

4. The Internal Revenue Service has been conducting an investigation of the income tax liabilities of Manning A. and Jean G. Kless for the years 1960 and 1961 and the workpapers sought by the summons here are relevant and material to such inquiry.

Conclusions of Law

1. The workpapers required to be produced by the Internal Revenue Service Summons of March 21, 1963 are the property of Lloyd B. Phillips. California Business and Professional Code § 5037.

2. William H. Deck cannot validly assert a claim of attorney-client privilege with respect to the workpapers

owned by Lloyd B. Phillips and which were claimed to be the property of his clients Manning A. and Jean G. Kless.

3. Manning A. Kless and Jean G. Kless cannot validly assert a claim of the Fifth Amendment of the United States Constitution, i.e., the privilege of self-incrimination, with respect to workpapers which are owned by Lloyd B. Phillips.

4. The Court has concluded as a matter of law that the workpapers be produced forthwith by William H. Deck and be delivered to Petitioner William J. Kiger and that Special Agent Kiger deliver them forthwith to the Clerk of the Court wherein they were to be impounded under seal pursuant to the Order of this Court.

/s/ John J. Sirica
Judge

Certificate of Service

I HEREBY CERTIFY that service of the foregoing proposed Findings of Fact and Conclusions of Law and accompanying proposed Order has been made upon the Respondent, William H. Deck, by mailing copies thereof to his attorney, Robert M. Scott, Esquire, 815 15th Street, N.W., Washington, D.C.; and upon the Intervenor Respondents, Manning A. Kless and Jean G. Kless, et al., by mailing copies thereof to their attorneys, Robert M. Scott, Esquire, 815 15th Street, N.W., Washington, D.C. and William H. Deck, Esq., 425 13th Street, N.W., Washington, D. C., on this 27th day of January, 1964.

/s/ John E. Hogan
JOHN E. HOGAN
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 40-63

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM H. DECK, RESPONDENT

and

MANNING A. KLESS and JEAN G. KLESS, Individually and as members of a partnership doing business as the J.B. KLESS COMPANY, INTERVENORS-RESPONDENTS

ORDER

This matter having come before the Court on the petitioners' Application for Enforcement of an Internal Revenue Service Summons and the Court having entered an Order to Show Cause with respect to that Application on November 21, 1963, and the matter having come on for hearing in open Court on January 23, 24, 1964, and the Court, on January 23, 1964 having granted Intervenors' Petition to Intervene, and the Court at the termination of the hearing having made findings of fact and conclusions of law and having ordered the respondent William H. Deck, to forthwith comply with Internal Revenue Service Summons of March 21, 1963, and deliver the records called for therein to petitioner William J. Kiger; and the Court having further ordered William J. Kiger to forthwith deliver the records to the Clerk of the Court for impounding under seal, and those orders having been complied with, of record, it is by the Court this 29th day of January, 1964,

ORDERED that the respondent and intervenors have a period of forty-eight (48) hours from the date of the

entry of this Order in which to note an appeal, in the absence of which, the Court directs and orders the Clerk of Court to deliver to the petitioner William J. Kiger the workpapers impounded by the Court on January 24, 1964; and it is

FURTHER ORDERED, that in the event of appeal that the workpapers remain in the protective custody of the Clerk of this Court, provided, however, should the appeal be denied or the order of this Court be otherwise affirmed, that the records be delivered to the petitioners without further order of this Court.

/s/ J. Sirica
Judge

Docket Submitted 1-31-64 /s/ J E H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 40-63

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

WILLIAM H. DECK, RESPONDENT

and

MANNING A. KLESS and JEAN G. KLESS, Individually and as members of a partnership doing business as the J. B. KLESS COMPANY, INTERVENORS-RESPONDENTS

AMENDING ORDER

This Court having entered an order in this matter on 29 January 1964 it is and the same is hereby amended by the Court this 31st day of January, 1964, as follows:

ORDERED that the last line of the first page of the order of this Court dated the 29th day of January 1964 be corrected by deleting the words "forty-eight (48) hours" and inserting in lieu thereof the words "ten (10) days".

/s/ J. Sirica
Judge

CONSENTED TO:

.....

ROBERT M. SCOTT
Attorney for Intervenors-Respondents

.....

JOHN E. HOGAN
Attorney for Petitioners

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18494

WILLIAM H. DECK, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided June 25, 1964

Mr. William H. Deck, with whom *Mr. Robert M. Scott* was on the brief, for appellants.

Mr. Richard B. Buhrman, Attorney, Department of Justice with whom *Assistant Attorney General Oberdorfer* and *Messrs. Lee A. Jackson* and *Joseph M. Howard*, Attorneys, Department of Justice, were on the brief, for appellee United States of America. *Mr. David C. Acheson*, United States Attorney, and *Mr. Frank Q. Nebeker*, Assistant United States Attorney, also entered appearances for appellee United States of America.

Before PRETTYMAN, Senior Circuit Judge, and BURGER and WRIGHT, Circuit Judges.

PRETTYMAN, *Senior Circuit Judge*: The United States and a Special Agent of the Internal Revenue Service ap-

plied to the District Court for the enforcement of a summons addressed to William H. Deck, our appellant. The application stated that the Internal Revenue Service had been investigating the income tax liabilities of two taxpayers named Kless for the years 1960-61. It further recited that a summons had been issued to one Lloyd B. Phillips, a public accountant licensed in California and residing in San Francisco, directing him to produce accounting work papers relating to services he had performed on the books and papers of J. B. Kless Co. for the years 1955-61. It further recited that Phillips advised the Internal Revenue Service that he was willing but unable to comply with the summons, in that he had turned over the papers to the taxpayer, Kless, who indicated that his attorney, William H. Deck, desired to examine them. It further recited that Deck, in a letter to Phillips, acknowledged receipt of the papers and "indicated he would return them to him as soon as his examination of them was completed." The application further recited that Phillips twice made demands upon Deck to return the papers so that he (Phillips) could comply with the summons issued to him and that Deck had refused to return the papers. In this situation the Internal Revenue Service served a summons upon Deck. The latter at first refused to appear or to produce the papers but later delivered the papers to the registry of the court, where they are now impounded.

Manning A. Kless and Jean G. Kless, individually and as the sole members of a partnership, The J. B. Kless Co., intervened in the court action, claiming the records described in the summons belonged to them and not to Phillips.

A show cause order was issued on Mr. Deck and a hearing held, in the course of which Mr. Kless took the stand, claimed the papers as his property, and asserted that his privilege against self-incrimination protected him against

production of the papers. The court found that the papers belonged to Phillips, concluded that the privilege was unavailable, and ordered Deck to comply with the summons.

Two contentions are urged in support of the appeal. First, appellant Deck argues that the trial court's finding that the papers were the property of Phillips is not supported by the evidence. He says the evidence shows that the services performed by Phillips were bookkeeping services only. Therefore, he says, the work papers are the property of Phillips's employer, the Kless Co. The Government, on the other hand, urges that Phillips was a registered public accountant who served the Kless Co. in that capacity. Thus, the Government tells us, under California law the papers are the property of Phillips.[1] We agree with the Government on this point. The record establishes that Phillips had worked for the Kless Co. since 1946. It was not until after the tax investigation began that Kless showed any interest in the work papers then in the possession of Phillips; until Kless requested them they were kept by Phillips in his office and were apparently regarded by all concerned as his property. Kless was only one of many who utilized Phillips's services. Phillips was not on the payroll of the partnership. Rather he billed the Kless Co. on an hourly basis, and the payments to him were recorded in the books under accounting services. Phillips testified that during the years in question his work consisted basically of reviewing the records for each year, verifying certain accounts, preparing a balance sheet and a profit and loss statement, and rendering a certificate (an accountant's opinion). We have examined the impounded work papers in question, and they support this testimony. In fact we agree with the trial court that these are the type

[1] CAL. BUSINESS AND PROFESSIONS CODE, 3A West's Annot. Cal. Code § 5037.

of papers which an accountant would normally produce and keep in his files. We think the evidence abundantly supports the findings of the District Court that Phillips served the Kless Co. as an accountant. Under the California Code the work papers of a public accountant are his property.[2] It follows, therefore, that the trial court correctly ruled that the papers belonged to Phillips.

As his second point appellant Deck argues that, even if the papers were the property of Phillips, their production cannot be compelled without violating Kless's privilege against self-incrimination. It is his position that, since Kless came into possession of the papers rightfully, he can prevent their production through invocation of the privilege. However, the argument overlooks the uncontroverted evidence that, after Kless obtained the papers and before the summons was served, their owner, Phillips, had made demands for their return. Thus, at the time the Government sought production, neither Kless nor Deck had any right to retain them. We think that one who holds papers against the owner's demands for their return cannot resist production by claiming the privilege against self-incrimination.[3]

Affirmed.

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[2] *Ibid.*

[3] See *Ex Parte* Fuller, 262 U.S. 91 (1923); Wilson v. United States, 221 U.S. 361, 380 (1911); United States v. Boccuto, 175 F.Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); Application of House, 144 F.Supp. 95 (N.D. Cal. 1956); Application of Daniels, 140 F.Supp. 322 (S.D.N.Y. 1956); 108 U. PA. L. REV. 1071, 1072 (1960); 49 VA. L. REV. 1372 n. 8 (1963).

APPENDIX C

UNITED STATES CONSTITUTION

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amend V

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

UNITED STATES CODE

Title 28, Sec. 1254. (1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 26, Sec. 7604 (a) (b)

Enforcement of Summons

> (a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) *Enforcement.*—Whenever any person summoned under section 7602 neglects or refuses to obey

such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

CALIFORNIA BUSINESS AND PROFESSIONS CODE

3A West's Annotated California Code, SEC. 5037

Accountant's Ownership of Papers.

All statements, records, schedules, working papers and memoranda made by a certified public accountant or public accountant incident to or in the course of professional service to clients by such certified public accountant or public accountant to a client shall be and remain the property of such certified public accountant or public accountant, in the absence of an express agreement to the contrary between the certified public accountant or public accountant and the client.

TREASURY DEPARTMENT CIRCULAR NO. 230 (Rev.)

Regulations on Practice of Attorneys and Agents before the Internal Revenue Service

Subpart A, Section 10.3 (a) (d)

(a) In general.—Persons applying for enrollment to practice before the Internal Revenue Service must show to the satisfaction of the Director of Practice that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render valuable service to clients, and otherwise competent to advise and assist clients in the presentation of their interests to the Internal Revenue Service. Applicants for enrollment have the burden of establishing that they possess a good character and reputation, an adequate education, knowledge and understanding of the laws and regulations relating to tax matters and other subjects administered by the Internal Revenue Service, and a knowledge of the rules governing practice before the Internal Revenue Service.

(d) Attorneys and certified public accountants.—If found to possess the qualifications provided for in this part, the Director of Practice may grant enrollment to practice before the Internal Revenue Service to persons of the following classes:

(1) Any attorney at law who is a member in good standing of the bar of the highest court of a State, Territory, or possession of the United States, or of the courts of the District of Columbia;

(2) Any certified public accountant who has duly qualified to practice as a certified public account in a State, Territory, possession of the United States, or in the District of Columbia.